No. 18-966

IN THE

Supreme Court of the United States

DEPARTMENT OF COMMERCE, *ET AL.*,
Petitioners,

v.

NEW YORK, *ET AL.*,
Respondents.

On Writ of Certiorari Before Judgment to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE ARAB AMERICAN INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

MAYA M. BERRY
RYAN J. SUTO
ARAB AMERICAN INSTITUTE
1600 K St. NW, Suite 601
Washington, DC 20006

JASON C. BEEKMAN
Counsel of Record
ESQELATE, LLC
1460 Rolling Green Way
North Potomac, MD 20878
jason.beekman@esqelate.com
(301) 529-8151

HARSH K. VORUGANTI
VORUGANTI LAW FIRM, PLLC
1655 North Fort Myer Drive,
Suite 700
Arlington, VA 22209

Counsel for Amicus Curiae

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INTEREST OF AMICUS CURIAE[1]

The Arab American Institute ("AAI") is a nonprofit, nonpartisan national leadership organization established under Section 501(c)(4) of the Internal Revenue Code. It represents the policy and community interests of Arab Americans across the United States, and was created to nurture and encourage the direct participation of Arab Americans in political and civic life. In particular, AAI serves as a central resource for government officials, the media, political leaders, and community groups on a variety of public policy issues that concern Arab Americans and U.S.–Arab relations.

Accurate counting of the Arab American population has been a central part of AAI's mission, beginning in the late 1980s when AAI first worked with the U.S. Census Bureau to ensure all Arab Americans were counted in the 1990 census. To that end, in 1994, AAI helped launch the Ancestry Working Group to support the Census Bureau's efforts to decrease systemic undercounting of Arab Americans. Since 2001, AAI has served as a Census Information Center ("CIC") partner. Throughout the last 30 years, AAI has developed a strong working relationship with the Census Bureau and has attended sev-

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[1] No counsel for a party authored this brief in whole or in part, and no party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Letters from all parties consenting to the filing of this amicus curiae brief have been filed with the Court.

eral meetings with current and past Bureau directors, including a meeting at AAI's office with former Bureau Director John Thompson on March 18, 2014. AAI has participated in numerous meetings with Census Bureau staff at every level of the agency over the past four decades. AAI also regularly communicates with the Bureau by sending letters and providing comments to federal register notices on proposed changes and field operations. Today, more than ever, AAI remains committed to working with the Census Bureau to ensure an accurate census.

Petitioners' decision, however, to add a demand for person-by-person citizenship information to the 2020 census undermines AAI's interest in an accurate census that counts all Arab Americans, and serves only to inflict undue harm. In an AAI-commissioned study, for example, twenty-eight percent of the Arab Americans polled stated that they were either not sure or not likely to respond to the census if they had to report their citizenship.[2] This concerningly high proportion was consistent for both U.S.-born and foreign-born respondents.

It is incontrovertible that the citizenship question will lead to a significant undercount of Arab American citizens and noncitizen residents, as well as other similar hard-to-count communities that include

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[2] Arab American Institute Foundation, *Stand Up and Be Counted: A Study of Arab Americans and the 2020 Census*, (Sept. 17 2018); Message Testing Research Conducted by John Zogby Strategies.

significant numbers of authorized and undocumented immigrants. The impact on these populations' representative interests and the provision of vital services cannot be overstated.

SUMMARY OF ARGUMENT

The question before the Court is whether the district court erred in finding that Secretary of Commerce Wilbur Ross acted in an "arbitrary and capricious" way, in violation of the Administrative Procedures Act ("APA"), 5 U.S.C. § 706(2)(A), in deciding to add a citizenship question to the 2020 census. Looking at long-established census processes and recent decisions on other proposed census changes, it is clear the district court did not err. Secretary Ross's decision to add a citizenship question, and the process behind the decision, deviated significantly from established procedure – it was not made in accordance with law and was, indeed, arbitrary and capricious.

For over twenty years another proposed census change – the inclusion of the Middle Eastern or North African ("MENA") category – has been rigorously examined. The proposed addition of this category has complied with all constitutional, statutory, and regulatory requirements and proceeded through all established administrative procedures for addition to the census. As a result of this intense study, Petitioners found that including the MENA category would indeed improve the accuracy of collected and disseminated census data. *See* 15 C.F.R. § 90.2 ("It is the policy of the Census Bureau to provide the most

accurate population estimates possible."). However, in January 2018, Petitioners, along with the Office of Management and Budget ("OMB"), chose *not* to add the MENA category, concluding that the change required even *more* testing.

In stark contrast, a mere two months later, Petitioners proposed to add the citizenship question to the 2020 census without any relevant testing or study. The addition of the citizenship question without a fraction of the process other proposed census changes have undergone represents an extreme departure from the statistical standards long promoted to ensure accuracy of information collected and disseminated by Petitioners. Not only is there a lack of robust study on the impact of the question on census accuracy, Petitioners concede evidence exists suggesting the citizenship question would result in lower census response rates. Pet. App. 150a.

The decision to delay a census change that was well-studied and would increase accuracy highlights Secretary Ross's statutorily proscribed decision to rush the addition of a citizenship question, a change that was unstudied and is likely to decrease accuracy. The extensive testing of the MENA category demonstrates the established, rigorous administrative procedures for additions to the decennial census; procedures which, even after twenty years in the MENA case, did not prove successful. By bypassing all the statutorily and regulatorily required testing and procedures in order to hastily add a citizenship question, Secretary of Commerce Wilbur Ross acted

in an "arbitrary and capricious" way, and, as such, violated the APA. The holding of the district court should stand.

ARGUMENT

The decision to add a citizenship question should be viewed in the context of established procedures and concurrent decisions on other census changes.

I. The Decision on Recently Proposed Middle Eastern or North African Census Category Demonstrates Established Procedure For Changes in Census Language.

The U.S. Constitution requires that Representatives "shall be apportioned among the several States . . . according to their respective Numbers," U.S. Const. art. I, § 2, cl. 3; which requires "counting the whole number of persons in each State," *id.* amend. XIV, § 2. Under 13 U.S.C. §§ 2, 4, and 141, Congress empowered the Secretary of Commerce with this counting responsibility, requiring "that the decennial enumeration of the population be as accurate as possible, consistent with the Constitution and laws of the United States." *See also* Information Quality Act ("IQA"). Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, § 515, 114 Stat. 2763 (Dec. 21, 2000). The importance of data accuracy is further emphasized in Census Bureau regulations. *See* 15 C.F.R. § 90.2 ("It is the policy of the Census Bureau to provide the most accurate population estimates possible.").

To comply with these constitutional, statutory, and regulatory requirements, the Census Bureau carefully develops and tests the content, specific language, order, and layout of each decennial census form and related field procedures. These quality assurance processes involve numerous steps, all aimed at improving the accuracy of the census and ensuring the final data are reliable and objective.

In the late 1990s and early 2000s, the federal government took efforts to study and improve the accuracy of demographic data. During the 1997 review of federal standards to measure race and ethnicity in the United States, for example, OMB opened a comment period on the standards for reporting race and ethnicity.[3] Based on the comments received, OMB concluded that, *inter alia*, demographic accuracy required further research on an Arab or Middle Eastern ethnic category.[4]

A few years later, the Census Bureau found that "[e]vidence from Census 2000 suggested that the inclusion of Middle Eastern and North African groups in the 'White' category may not be obvious to many respondents, resulting in increased reporting in the 'Some Other Race' category."[5] The report recommended "[e]xpand[ed] options for category selection

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[3] U.S. Census Bureau, *Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity* (Oct. 30, 1997).
[4] *Id.*
[5] U.S. Census Bureau, *2010 Census Race and Hispanic Origin Alternative Questionnaire Experiment* (Feb. 28, 2013) at p. 6.

in order for respondents to easily self-identify their groups,"[6] and noted that "[t]here was strong agreement across all groups that there should be a Middle East-North Africa group."[7] Based on these recommendations, the 2010 Alternative Questionnaire Experiment ("AQE") conducted by the Census Bureau tested variations on measuring race and ethnicity, and included focus groups on a MENA ethnic category.[8] The 2010 AQE supported the need for a distinct MENA category.[9]

OMB has long required extensive testing for government agency forms and questionnaires; proposed changes to government demographic categories to include the MENA category were no different. OMB set a high standard: asking all agencies to design surveys that "achieve the highest practical rates of response, commensurate with the importance of survey uses, respondent burden, and data collection costs, to ensure that survey results are representative of the target population so that they can be used with confidence to inform decisions." See Office of Mgmt. and Budget, Standards and Guidelines for Statistical

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[6] *Id.* at p. 130.
[7] *Id.* at p. 131.
[8] U.S. Census Bureau, ***2010 Census Alternative Questionnaire Experiment (AQE): Census 2000 Form Replication Panel*** (Jan. 19, 2012).
[9] U.S. Census Bureau, ***2010 Census Race and Hispanic Origin Alternative Questionnaire Experiment*** (Feb. 28, 2013), p.132.

Surveys 1 (Sept. 2006)[10]; 71 Fed. Reg. 55522-01 (Sept. 22, 2006).

Understanding the need for rigorous testing of any proposed changes to government forms in order to ensure improved accuracy, in July of 2013 a broad coalition of advocates and scholars sent a letter to OMB Chief Statistician Dr. Katherine Wallman outlining the scope of the undercount of MENA populations and advocating for a MENA ethnic category to improve data collection.[11] The following year, AAI presented research on the creation of a MENA ethnic category to the Federal Interagency Working Group for Research on Race and Ethnicity ("IWG") at a meeting hosted by OMB.[12]

Then, in October of 2014, the Census Bureau announced that in 2015 it would begin testing a MENA

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[10] U.S. Office of Management and Budget, *Standards and Guidelines for Statistical Surveys* (Sept. 2006).

[11] Letter from the Arab American Institute to Katherine K. Wallman, Chief Statistician, Office of Management and Budget, (July 2013), *found here*: https://d3n8a8pro7vhmx.cloudfront.net/aai/pages/7874/attachments/original/1517501585/Wallman_OMB_MENA.pdf?1517501585.

[12] Presentation from the Arab American Institute on MENA Ethnic Research to the Interagency Working Group (July 24, 2014), *found here*: https://d3n8a8pro7vhmx.cloudfront.net/aai/pages/7874/attachments/original/1517501695/OMB_presentation_2014_%282%29.pdf?1517501695.

category for possible inclusion on the 2020 census.[13] A notice for comment on the proposed category in the Federal Register resulted in a record number of positive responses supportive of the expanded demographic category.[14] In total, the Census Bureau received 4,473 comments expressing "strong support" for testing a MENA category and only 15 comments dissenting.[15]

Study of the MENA category continued in May of 2015 when the Census Bureau hosted the "2015 Forum on Ethnic Groups from the Middle East and North Africa." There, "[n]early all participants were pleased to hear of the Census Bureau's plans to test a Middle Eastern or North African category on the 2015 National Content Test."[16] Two months later, AAI, along with numerous community organizations that make up the MENA Advocacy Network, formally requested that the Census Bureau consider the creation of a MENA category, noting that the change would more accurately represent the multiple racial,

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[13] U.S. Census Bureau, *Press Kit: Census Bureau Host 2020 Census Operations Update to Discuss 2015 National Content Test* (October 6, 2014).

[14] U.S. Census Bureau, *Presentation for the National Advisory Committee on Racial, Ethnic, and Other Populations* (March 26, 2015).

[15] *Id.* at p. 8.

[16] U.S. Census Bureau, 2015 Forum on Ethnic Groups from the Middle East and North Africa (Sept. 7, 2016) at p. vii.

ethnic, and national identities of Americans with Middle Eastern or North African ancestry.[17]

Shortly after the Forum, the MENA category was included in field testing as part of the National Content Test ("NCT"). The Census Bureau released the results of the NCT in October of 2016 and recommended the inclusion of a MENA category.[18] Overall, the NCT concluded that use of a MENA category elicited more accurate data, and, as such, the Census Bureau recommended the inclusion of a dedicated MENA category on all additional testing.[19]

The Census Bureau also found that the 2015 NCT "demonstrated the merits of using a combined race/ethnicity question with detailed checkboxes that includes a dedicated Middle Eastern or North African (MENA) response category."[20] Further, the Bureau found that using "a distinct MENA category elicits higher quality data; and people who identify as MENA use the MENA category when it is available, whereas they have trouble identifying as only

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[17] Letter from the Arab American Institute to Glenna Mickelson, Management Analyst, Office of the Chief Information Office, Department of Commerce (July 10, 2015) *found here*: https://d3n8a8pro7vhmx.cloudfront.net/aai/pages/7874/attachments/original/1517509802/2015_OMB_Federal_Register_AAI_Comment.pdf?1517509802.

[18] U.S. Census Bureau, *2015 National Content Test Preparing for the 2020 Census* (2015).

[19] U.S. Census Bureau, *National Advisory Committee on Racial, Ethnic and Other Populations Fall Meeting* (November 3-4, 2016).

[20] *Id.* at p. 5.

MENA when no category is available."[21] Thus, with rigorous study and documented support, the Bureau concluded that "it is optimal to use a dedicated 'Middle Eastern or North African' response category" on the 2020 census.[22]

Despite this conclusion, the MENA category still received additional scrutiny. In September of 2016, OMB published "Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity" in the Federal Register, which requested, *inter alia*, recommendations for principles that should govern revisions to race and ethnicity categories.[23] There, OMB "encouraged further research be done to determine the best way to improve data for 'Arabs/Middle Easterners'" and noted that "[t]he Federal Interagency Working Group for Research on Race and Ethnicity continues to examine this proposal, with input from multiple stakeholders."[24]

On February 24, 2017, the IWG published an interim report, *Review of Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity*, which proposed the addition of a Middle Eastern or North African classification that was geo-

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[21] U.S. Census Bureau, *2015 National Content Test Race and Ethnicity Analysis Report* (Feb. 28, 2017) at p. 84.
[22] *Id.*
[23] U.S. Office of Management and Budget, *Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity* (Sept. 30, 2016).
[24] *Id.*

graphically based.[25] The report defined the MENA classification as encompassing "[any] person having origins in any of the original peoples of the Middle East and North Africa. This includes, for example, Lebanese, Iranian, Egyptian, Syrian, Moroccan, Israeli, Iraqi, Algerian, and Kurdish."[26]

Soon thereafter, on March 1, 2017, the IWG published a Federal Register Notice identifying four areas where further revisions regarding standards for data collection were needed and specifically recognizing "[t]he classification of a Middle Eastern and North African (MENA) group and distinct reporting category."[27] AAI submitted a comment to the Notice affirming the importance of a MENA category on the 2020 census.[28]

After years of study, it seemed everything was on track for the 2020 census to include the MENA cate-

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[25] Federal Interagency Working Group for Research on Race and Ethnicity, *Interim Report to the Office of Management and Budget: Review of Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity* (May 2016) at p. 3.

[26] *Id.*

[27] Federal Interagency Working Group for Research on Race and Ethnicity, *Proposals from the Federal Interagency Working Group for Revision of the Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity, 82 Fed. Reg. 12,242* (Mar. 1, 2017).

[28] Letter from the Arab American Institute to Dr. Nancy Potok, The Office of the U.S. Chief Statistician, Office of Information and Regulatory Affairs, Office of Management and Budget (Apr. 28, 2017); Comment ID: OMB-2017-0003-1785.

gory. The Census Bureau's website "Research to Improve Data on Race and Ethnicity," for example, notes: "the Census Bureau's 2018 End-to-End Test will a) employ the successful question format design which uses a combined question with detailed checkboxes design and b) include a dedicated 'Middle Eastern or North African' response category. The Census Bureau is recommending a separate response category for MENA respondents, where any MENA responses would be aggregated to the White category following the current OMB Standards."[29]

Despite this long history of testing, planning, and statistics-based analysis and recommendations from OMB, the Census Bureau, and stakeholders, on January 26, 2018, the Census Bureau announced that the MENA category would not be added to the 2020 census, stating "[i]n accordance with current OMB standards, the 2018 End-to-End Census Test and the 2020 Census will use two separate questions for collecting data on race and ethnicity. . . . The Census Bureau will not use a combined question format for collecting race and ethnicity; or a separate 'Middle Eastern or North African' category on the census form."[30] The same month that the Census Bureau decided to not provide further testing of the MENA category via the End-to-End testing, Karen Battle, Chief

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[29] U.S. Census Bureau, Research to Improve Data on Race and Ethnicity (Mar. 6 2017).

[30] U.S. Census Bureau, *Using Two Separate Questions for Race and Ethnicity in 2018 End-to-End Census Test and 2020 Census* (Jan. 26, 2018) at p. 2.

of the Census Bureau's Population Division stated, "We do feel that more research and testing is needed," with respect to the MENA category.[31]

Despite reliable positive conclusions arrived upon through decades of careful testing and evaluation required by the Bureau's guidelines, and internal and stakeholder recommendations based thereupon, a MENA category was nonetheless rejected from addition to the 2020 census in favor of further testing.

II. In Contrast, Petitioners' Decision to Add a Citizenship Question Reflects a Departure from Established Procedure.

The relevant constitutional, statutory, and regulatory requirements described above with respect to the MENA category apply to the addition of any other prompt on the census, including the proposed addition of a citizenship question. Indeed, under the Census Bureau's Statistical Quality Standards ii (July 2013), "pretesting must be performed" to avoid questionnaire content that could cause "confusion," "misinterpretation" and "a loss of information."[32] However, when compared to the extensive testing process undertaken with relation to the MENA category, the addition of the citizenship question stands out as abrupt and perfunctory.

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[31] National Public Radio, *No Middle Eastern Or North African Category On 2020 Census, Bureau Says* (Jan. 29, 2018).
[32] U.S. Census Bureau, *U.S. Census Bureau Statistical Quality Standards* (Jul. 2013) at p. 8.

Notably, between 1997, when OMB first recognized the need for research into a MENA category, and January 2018, when the category was excluded from the 2020 census, no mention was made by the Census Bureau of the addition of a citizenship question. In fact, during March of 2018, the Census Bureau launched its final field test for the 2020 census, designed to be the last trial run to ensure the questionnaire would garner the most accurate responses practicable. That field test did not include a citizenship question in any form.[33] Instead, the first public acknowledgement of a citizenship question was later that month when Commerce Secretary Wilbur Ross testified in Congress that "On March 26, 2018, I decided to reinstitute a citizenship question on the 2020 census."[34]

When compared to the extensive testing process undergone by the MENA category, the arbitrariness of the Secretary's decision stands out. Unlike the former, the citizenship question was never submitted to a formal notice-and-comment process, nor was input sought from stakeholders on a more informal basis. The question, excluded from all prior field tests, was not tested before its addition was proposed.

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[33] U.S. Census Bureau, *Final Census Test Proves Successful* (Sept. 5, 2018).

[34] C-Span, *Commerce Secretary Ross on the 2020 Census* (March 14, 2019) *found at* https://www.c-span.org/video/?457414-1/commerce-secretary-ross-2020-census, min. 38:49.

Not only does the citizenship question need more testing, but even the limited evidence in the record suggests that the addition of the question would hurt the accuracy of the response data – contravening the Bureau's statutorily prescribed duty. This can be most clearly understood by looking at the American Community Survey ("ACS"). The ACS, which utilizes a citizenship question, surveys a small portion of the American public, roughly 3.5 million households across the country, with the goal of understanding a variety of detailed characteristics.[35] On the ACS survey, the Census Bureau's Chief Scientist and Associate Director for Research and Methodology, John Abowd, stated "item nonresponse rates for the citizenship question are much greater than the comparable rates for other demographic variables like sex, birthdate/age, and race/ethnicity." Mem. from J. Abowd to W. Ross (Jan. 19, 2018), at 1.[36] Petitioners have even conceded "there is 'credible quantifiable evidence' that 'the citizenship question could be expected to cause a decline in self-response.'" Pet. App. 150a (quoting trial transcript).

Unlike the ACS, which counts a relatively small percentage of the U.S. population, the decennial census is mandated to count every single person who resides in the United States and must attempt to reach

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[35] U.S. Census Bureau, *American Community Survey Information Guide* (Oct. 2017).

[36] U.S. Census Bureau, *Technical Review of the Department of Justice Request to Add Citizenship Question to the 2020 Census* (Jan. 19, 2018) at p. 1289.

every household or unit where someone lives. Any unnecessary deterrent toward participation with the decennial census would undermine the Census Bureau's obligation to provide an accurate enumeration of all persons. Const. art. I, § 2, cl. 3; *Id.* amend. XIV, § 2.

Furthermore, this decrease in response rates undermines the constitutional mandate that the census provide "an accurate enumeration of all persons." *Id.* The Census Bureau itself concluded last year that the addition of "a citizenship question to the 2020 Census would lead to lower self-response rates in households potentially containing noncitizens . . . ." J. David Brown et al., *Understanding the Quality of Alternative Citizenship Data Sources for the 2020 Census* 54 (Aug. 2018).[37] As communities with greater proportions of noncitizens make up many of those that the Census Bureau already designates as Hard to Count communities, the Bureau's own data suggest that such communities will be undercounted if the citizenship question is included. Importantly, such an undercount will likely result in malapportioned legislative districts, some with significantly greater populations than other districts within the same state, and will undercut this Court's mandate that districts maintain proportionality of population in their districts. *See Wesberry v. Sanders*, 376 U.S. 1 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964).

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[37] U.S. Census Bureau, *Understanding the Quality of Alternative Citizenship Data Sources for the 2020 Census* (Aug. 2018).

Moreover, with the Secretary's decision coming just two years before the 2020 census, there is no time to test the citizenship question in any meaningful way. Petitioners simply ignored IQA standards requiring the testing of each question to "ensure that all components of a survey function as intended," as well as the incorporation of testing results into the final design of the questionnaire.[38] Indeed, the Census Bureau's failure to test its demand for citizenship information before deciding to include it on the 2020 census questionnaire is unprecedented in the modern administration of the decennial census and emphasizes the arbitrariness of the decision. It certainly is a far cry from the decades of Census Bureau testing and research on the proposed MENA category.

By adding a citizenship question to the 2020 census in spite of insufficient testing and research questioning its utility, Petitioners departed from the robust statistical standards in place to promote the accuracy of information as required by the constitution, statutes, and regulations. In so doing, Petitioners did not "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Manufacturers' Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

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[38] Office of Management and Budget, *Statistical Policy Directive No. 2: Standards and Guidelines for Statistical Surveys Section 1.4* (2006).

In reviewing agency decisions, the judiciary must "hold unlawful and set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), in excess of statutory authority, *id.* § 706(2)(C), or "without observance of procedure required by law," *id.* § 706(2)(D). Accordingly, the district judge correctly found that Secretary Ross's addition of the citizenship question was, *inter alia*, "a dramatic departure from the standards and practices that have long governed administration of the census, and he failed to justify those departures." *New York v. Department of Commerce*, 315 F. Supp. 3d 766, 782-85 (S.D.N.Y. 2018).

CONCLUSION

For the reasons stated above, this Court should affirm the district court's decision.

Respectfully submitted,

MAYA M. BERRY
RYAN J. SUTO
ARAB AMERICAN INSTITUTE
1600 K St. NW, Suite 601
Washington, DC 20006

JASON C. BEEKMAN*
ESQELATE, LLC
1460 Rolling Green Way
North Potomac, MD 20878
jason.beekman@esqelate.com
(301) 529-8151

HARSH K. VORUGANTI
VORUGANTI LAW FIRM, PLLC
1655 North Fort Myer Drive,
Suite 700
Arlington, VA 22209

Counsel of Record

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